No. 86-1316

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

ETHEL R. HARRIS, as Trustee under the Trust Agreement dated March 1, 1973, et al.,
Petitioners,

v.

THE SENTRY CORPORATION and SNE CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The claim involved in this case is a Federal 10b-5 Securities claim brought in Federal court on purely Federal question jurisdiction. Plaintiffs timely filed their Federal 10b-5 complaint and timely served each of the defendants with process within the Federal 120-day period. Defendants, claimed, however, that Plaintiffs were required to serve them within a shorter 60-day State service period that would have been applicable had Plaintiffs hypothetically brought this claim in a Wisconsin State court.

The issue presented below — and now again to this Court — is whether procedural commencement of a Federal Securities 10b-5 action, for purposes of any chronological period of limitation, should be controlled by the Federal Rules of Procedure or by rules applicable to forum State claims.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the proceedings in the court below are accurately identified in Petitioners' brief. Pursuant to Supreme Court Rule 28, Respondent The Sentry Corporation states that its parent corporation is Sentry Insurance a Mutual Company; Respondent SNE Corporation states that its parent corporation is Respondent The Sentry Corporation. Their affiliated corporations are Sentry Fund, Inc., and Century Communications Corp.

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The Respondents The Sentry Corporation and SNE Corporation respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Seventh Circuit's Judgment and Opinion in this case. The opinion is reported at 802 F.2d 229 (1986).

RULES AND STATUTES INVOLVED

Jurisdiction of Offenses and Suits under the Federal Securities Exchange Acts, 15 U.S.C. § 78aa, provides in relevant part:

> "The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. . . ."

Rule 1 of the Federal Rules of Civil Procedure provides:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action."

Rule 3 of the Federal Rules of Civil Procedure provides:

> "Commencement of Action. A civil action is commenced by filing a complaint with the court."

Rule 4(j) of the Federal Rules of Civil Procedure provides in relevant part:

> "Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice on the court's own initiative with notice to such party or upon motion. . . ."

SUMMARY OF ARGUMENT

The Seventh Circuit correctly held that a Federal 10b-5 security claim brought in Federal court is controlled by the Federal Rules of Civil Procedure for purposes of commencement and service of process issues, and not by rules enacted by state legislatures for use in state courts processing domestic claims. Federal 10b-5 claims are strictly creatures of Federal law involving only Federal rights and interests. Federal jurisdiction over 10b-5 claims is exclusive. No state has, or can claim, any interest in Federal 10b-5 claims.

This Court has championed the philosophy that litigants and the legal system are entitled to "bright line rules" and "simple rules" for determining when a Federal action will be deemed timely commenced. Rule 3 sets forth in simple and unequivocal language the circumstances under which Federal civil actions will be deemed commenced:

> "A [Federal] civil action is commenced by filing a complaint with the court."

Rule 4 instructs in similarly clear language how much time a Federal plaintiff has in which to perfect service: 120 days.

Substituting fifty different sets of individual state court procedural rules for determining service of process and commencement issues for Federal claims in Federal courts is contrary to controlling law and defeats the goal of providing such "bright line rules." As the Seventh Circuit observed:

> . . . [A]pplication of Fed. R. Civ. P. 3 will promote greater uniformity because the commencement of all Federal causes of action will be governed by the same rule. Although the causes of action may be subject to different state limitations periods, all such cases in every jurisdiction will be deemed commenced as of the date of filing. In this vein, it is significant that the application of state commencement rules might unduly complicate procedures in the Federal system. . . .

These procedural complications would not be counterbalanced by any definable state interest." (Seventh Circuit's Decision, App. 23-24).

The Federal rules are not optional. The Federal drafters of FRCP 3 expressly rejected service of process within sixty days as a condition subsequent to "commencing" Federal actions. FRCP 3 and 4(j) give Federal claimants litigating Federal rights 120 days in which to perfect service.

The unanimous decision of the Seventh Circuit affirms long standing and well-established majority precedent from the other circuits as well as the teachings of the Supreme Court on this subject. The decision incisively restates all policy reasons and precedents underpinning the straightforward rule that the Federal Rules of Civil Procedure control Federal question claims. Further confirmation of the Seventh Circuit's holding by issuance of a Writ of Certiorari is unnecessary. Rule 3 is already well-nigh universally recognized as controlling Federal claims in Federal courts over any happenstance contradictory forum state court rules. A writ of certiorari is unwarranted and should be denied.

ARGUMENT

A. *Background of the Federal Rules*

Federal Rules of Civil Procedure 3 and 4(j) are authorized by the Rules Enabling Act of 1934. 28 U.S.C § 2072. The Federal rules have the same force and effect as statutory law. *United States v. St. Paul Mercury Ins. Co.*, 361 F.2d 838, 839 (5th Cir. 1966), *cert. denied*, 385 U.S. 971. By express terms of the Enabling Act, any other prior law or enactment in conflict with the Rules is void. 28 U.S.C. § 2072. Courts and litigants must follow the Federal rules in the same manner as they must obey any other congressional enactment. The rules are binding on all Federal courts. FRCP 1.

Federal Rule of Civil Procedure 3 provides:

> "A civil action is commenced by filing a complaint with the court."

When Rule 3 was still in its draft stage and preliminary proposals were being circulated and debated by the bar and bench throughout the country, it was proposed that Federal actions should abate unless additionally service of process was made within sixty days. *See, Messenger v. United States,* 231 F.2d 328, 329 (2nd Cir. 1956). An alternative proposal was that Federal actions should abate for failure to serve process within sixty days "unless within that period the court for good cause shown extended the time for service." *Id.* In the end, however, all conditions on Rule 3's "commencement upon filing" rule were rejected. *Id.* As the Advisory Committee noted, if a plaintiff unreasonably delays in serving process, Rule 41(b) provides "a method available to attack unreasonable delay in prosecuting an action after it has been commenced." *Id.* Up until February 26, 1983, the no-specific time limit rule for completing Federal service remained. Then, on February 26, 1983, Congress added Rule 4(j) which established a pre-determined Federal period of time for completing service. That time period is 120 days.

B. *The Seventh Circuit's Decision Follows This Court's Decision in Walker v. Armco Steel Corp.*

In *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), this Court held that in cases where a Federal court sits as just another state court in diversity jurisdiction, and is adjudicating strictly state-created claims, that pendant state commencement and service of process rules must be applied to the state claims instead of the Federal rules. That was because *Erie R. Company v. Tompkins,* 304 U.S. 64 (1938) compelled the result that state created claims not be given any longer life in Federal court than would otherwise attach to the same state claims had they been processed in a forum state's court.

In carving out this rule for diversity actions, this Court took special care to state that this rule applied only to state created claims:

> The Court suggested in *Ragan [v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949)] that in suits to enforce rights under a federal statute Rule 3 means that filing of the complaint tolls the applicable statute of limitations. 337 U.S., at 533, distinguishing *Bomar v. Keyes*, 162 F.2d 136, 140-141 (CA2), *cert. denied*, 332 U.S. 825 (1947). See Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 729 (1974). See also *Walko Corp. v. Burger Chef Systems, Inc.*, 180 U.S. App. D. C., at 308, n.19, 554 F.2d, at 1167, n.19; 4 Wright & Miller, supra, § 1056, and authorities collected therein. We do not here address the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law." 446 U.S. at 751 n.11.

As alluded to by the Supreme Court, where an action in Federal court involves federally created rights, Federal courts, including this Court, have consistently recognized that Rule 3 controls when a Federal claim will be deemed procedurally commenced for purposes of any period of limitation. *See generally*, 2 Moore's Federal Practice ¶3.07 [4.-3-2] (1977) and authorities cited therein ("Where a federal matter or cause of action is involved, the cases have uniformly held that an action is deemed commenced at the time the complaint is filed.") *Also see, Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949). Under Rule 3 a Federal action is deemed commenced upon filing of the complaint; the time at which defendants are later served is irrelevant to commencement of the Federal action.

The most often cited case recognizing the applicability of the "commencement-upon-filing" rule of FRCP 3 to Federal question cases just like the one now under review (namely ones wherein the Federal court, out of convenience, happens to incorporated a chronological period of limitation from state law) is *Bomar v. Keyes*, 162 F.2d 136, 140 (2nd Cir. 1947), *cert. denied*, 332 U.S.

825, *reh. denied,* 332 U.S. 845. *Bomar* involved an alleged violation of § 1983 of the Civil Rights Act.[1] Section 1983 has no express statute of limitation so consequently one was lifted from local law.

As in *Walker,* the plaintiff in *Bomar* timely filed her complaint but did not serve the defendants until after the state chronological time period had elapsed. Under local law, state claims could not be deemed "commenced" until after the defendants were actually served with process, or until process was placed into the sheriff's hands for service. In contrast, newly-adopted Rule 3 provided that Federal causes of action were deemed commenced upon filing.

Holding that Federal law — not state law — controlled Federal causes of action, Judge, later Justice Learned Hand wrote:

> "However, we now hold that it is the filing of the complaint which tolls the statute. We think that Rules 3 and 4(a) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723(c), have made no longer applicable § 17 of the New York Civil Practice Act, which fixes the beginning of the action at the date when the writ is served, or is put into the sheriff's hands for service." 162 F.2d at 140.

Bomar was appealed to the Supreme Court. This Court denied certiorari and any rehearing thereof. 332 U.S. 825, *reh. denied,* 332 U.S. 845.

From *Bomar* through *Walker* until today, all Federal Courts and cases, with only one exception in forty years,[2] have continued to acknowledge the authority of FRCP 3 as controlling the issue of when a Federal cause of action will be deemed procedurally commenced in cases where the period of limitation is coincidentally borrowed from state law. *See e.g., Lyons v. Good-*

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[1]At the time, Section 1983 was numbered 8 U.S.C. § 43.

[2]*Checki v. Webb,* 785 F.2d 534 (5th Cir. 1986).

son, 787 F.2d 411 (8th Cir. 1986); *Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), cert. denied,* 470 U.S. 1084; *Hoffman v. Halden,* 268 F.2d 280, 302 (9th Cir. 1959) *Mohler v. Miller,* 235 F.2d 153 (6th Cir. 1956).[3]

Contrary to Petitioner's repeated assertions (see Petitioner's brief p. 10) *Walker* clearly does not suggest, much less hold, that Rule 3 should not be followed in Federal question cases. Just the opposite is true.

Consistent with this Court's pronouncements in *Walker* and in other cases,[4] and the manifest weight of appellate and

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[3]For the most recent cases see e.g.,: *DiVerniero v. Murphy,* 635 F.Supp. 1531 (D. Conn. 1986); *Gerasimou v. Ambach,* 636 F.Supp. 1504 (E.D. N.Y. 1986); *Katz v. Molic,* slip opinion, case 83 Civ. 2943 (S.D. N.Y. Oct. 30, 1986) (available on Lexis); *Gish v. The City of Edwardsville, Kansas,* slip opinion, Case 86-2066-S (D.Kan. Oct. 8, 1986) (available on Lexis); *Hodgin v. Agents of Montgomery Co.,* 619 F.Supp. 1550 (E.D. Pa. 1986); *Robinette v. Johnston,* 637 F.Supp. 922 (M.D. Ga 1986).

[4]The most recent evidence of this Court's thinking on the issue was in a dissent from the denial of certiorari in *Smith v. Kroger Co.,* 105 S.Ct. 2155, 2156 (1986).

> "The lower courts agree that a suit in federal court on a federal cause of action is commenced, and the statute of limitations tolled, upon the filing of the complaint. See, e.g., *Hobson v. Wilson,* 373 F.2d 1, 44 (CADC 1984); Fed. Rule Civ. Proc. 3.; J. Moore & J. Lucas, Moore's Federal Practice ¶3.07[43-2-] (1984). While the time for service of process is not open-ended, see Fed. Rules Civ. Proc. 4(a), 4(j), it need not occur within the limitations period. Ordinary federal practice thus conflicts with the specific terms of this borrowed [federal] statute of limitations. In light of this inconsistency, the brevity of the limitations period, and the fact that § 10(b) was not intended to apply to judicial proceedings, the result below [which merely substituted another *Federal* commencement rule instead of Rule 3] is not obviously correct. (Dissent by Justice White joined by Justices Brennan and Marhsall.)

Also see, Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).

scholarly authority, the Seventh Circuit's decision merely confirms that for Federal claims — particularly 10b-5 claims which can only be brought in Federal court — the Federal Rules of Civil Procedure control when such a claim will be deemed commenced. This result is compelled not only by the weight of precedent but also by the plain language of the Rule 3[5] and Federal legislation underpinning the promulgation of Rule 3.[6]

C. *Wilson v. Garcia and Johnson v. Railway Express Agency, Inc. Do Not Overrule the Well-Founded and Long-Standing Rule that FRCP 3 Controls Commencement Procedures Involving Federal Claims.*

In *Wilson v. Garcia*, 471 U.S. 261 (1985) this Court addressed an issue unrelated to this case of whether civil rights claims (§ 1983) should be treated as having only one essential Federal nature so as to eliminate the necessity of characterizing each § 1983 claim individually and then borrowing, ad hoc, differing state

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[5]As the Seventh Circuit observed: ". . . the language of Fed. R. Civ. P. 3 could not be much plainer. It states that the suit is "commenced" once the complaint is filed. "Commenced" as defined by Black's Law Dictionary means "to initiate by performing the first act," to "institute or start." Although the language of Fed. R. Civ. P. 3 does not expressly state that filing the lawsuit "tolls" the statute of limitations, the import of the language is clear that once the plaintiff has filed the complaint, he has done all that is necessary to "get the ball rolling" not only in terms of the other timing rules to which Fed. R. Civ. P. 3 relates, see e.g., Fed. R. Civ. P. 15(c), but also in terms of the statute of limitations." (Seventh Circuit's Decision, App. 10).

[6]The Federal Rules are promulgated pursuant to the Rules Enabling Act. 28 U.S.C. § 2072. Unless a rule is determined to be an invalid exercise of the Supreme Court's rule making authority, it must be applied to all matters within its ambit regardless of any coincident contrary state rules. *See, Hanna v. Plumer*, 380 U.S. 460 (1965). To date, no court has ever ruled in the context of a non-diversity case governed by an express Federal limitation that FRCP 3 violates the Rules Enabling Act, and hence cannot be applied. (See Seventh Circuit's Decision, App. 7.) Consistent with this authority the Seventh Circuit reaffirmed that Rule 3 is a valid exercise of the Supreme Court's rule making authority. (Seventh's Circuit's Decision, App. 7). Moreover, because Rule 3 unquestionably controls Federal question claims with *express* periods of limitation, the Seventh Circuit recognized that the Rule could thus be given no lesser scope to any other Federal claim, such as a 10b-5 action.

time periods to be applied to the claim as characterized. Holding that Federal values would be best served by articulating only one uniform nature for all such claims, this Court declared that henceforth, all § 1983 claims would be characterized as claims for personal injuries and thus subject only to the period of limitation applicable to such actions.

Wilson did not involve or address any state vs. Federal issue, or the issue of whose procedural service of process and commencement rules should apply in a Federal 10b-5 action. Im portantly, *Wilson* also did not involve any challenge to the scope or authority of any Federal Rule.

Petitioner's representation to this Court that *Wilson* establishes the controlling principles for this case is based on a one-line summation in *Wilson* of the holdings in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), *Chardon v. Fumero Soto*, 462 U.S. 650 (1983) and *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), which the author of *Wilson* included merely to emphasize, by comparison, that Federal law — as opposed to state law — controlled the initial issue of whose law should be used for characterizing § 1983 claims. That this sentence was only intended to illustrate this ancillary point is obvious from the context in which it is found.[7] It is this dicta which Petitioners now present to this Court as the authoritative rule that this Court should follow.

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[7]Here is the passage:

"We must first consider whether state law or federal law governs the characterization of a § 1983 claim for statute of limitations purposes. If federal law applies, we must next decide whether all § 1983 claims should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case. Finally, we must characterize the essence of the claim in the pending case, and decide which state statute provides the most appropriate limiting principle. Although the text of neither § 1983 nor § 1988 provides a pellucid answer to any of these questions, all three parts of the inquiry are, in the final analysis, questions of statutory construction.

Wilson does not supersede, extend, add or change any of the holdings of Johnson, Chardon or Tomanio. To the extent these § 1983 cases have any significance to the case at bar, they must stand on their own. Thus, the issue presented to the Seventh Circuit was whether *Johnson, Chardon* and *Tomanio* require Federal courts to ignore FRCP 3 and 4(j) in favor of state procedural service of process rules for a Federal l0b-5 action. The Seventh Circuit correctly held that they do not.

Addressing this issue, the Seventh Circuit carefully compiled the cases both before and after *Johnson, Chardon* and *Tomanio,* which have consistently recognized that where a Federal question case is involved, only the chronological period of limitation is borrowed from state law together with any state tolling law on which Federal law is *silent.*[8] (Seventh Circuit Decision, p.

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[7] *continued*

Our identification of the correct source of law properly begins with the text of § 1988. Congress' first instruction in the statute is that the law to be applied in adjudicating civil rights claims shall be in "conformity with the laws of the United States, so far as such laws are suitable." This mandate implies that resort to state law — the second step in the process — should not be undertaken before principles of federal law are exhausted. The characterization of § 1983 for statute of limitations purposes is derived from the elements of the cause of action, and Congress' purpose in providing it. These, of course, are matters of federal law. Since federal law is available to decide the question, the language of § 1988 directs that the matter of characterization should be treated as a federal question. Only the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law. [Here, the Supreme Court footnotes the cases of *Johnson v. Railway Express Agency, Inc., Chardon v. Fumero Soto* and *Board of Regents v. Tomanio.] Wilson v. Garcia,* 446 U.S. at 268-69.

There is no further analysis, reference or discussion of the opinions passing reference to *Johnson, Chardon,* and *Tomanio.*

[8]See Seventh Circuit's Decision, App. 13-14, citing, *Hobson v. Wilson,* 737 F.2d 1 (D.C. Cir. 1984), *cert. denied,* 470 U.S. 1984; *Hoffman v. Halden,* 268 F.2d 280, 302 (9th Cir. 1959); *Bomar v. Keyes,* 162 F.2d 136, 140 (2nd Cir. 1946), *cert. denied,* 332 U.S. 825; plus nine other cases from 1958 to 1986.

15-19). Obviously, when it comes to the specific question of service of process and commencement, Federal law is not silent; consequently, FRCP 3 must be followed.

Best summarizing the well-established body of law on this subject is *Cohen v. Board of Education,* 536 F.Supp. 486, 495 (S.D. N.Y. 1982):

> "The federal action cases, *Johnson, Robertson* and *Tomanio,* have all applied state law in areas in which federal law was deficient — *Johnson:* in respect to the effect of the filing of an EEOC complaint, *Robertson:* in respect to the death of a plaintiff, and *Tomanio:* in respect to the prosecution of an independent state action. The deficiency in those cases was the absence of any federal law on the issue. The issue then became whether the state rule used to correct the deficiency was inconsistent with the Constitution or federal law. 42 U.S.C. § 1988 (1976). In the present case, however, federal law does provide a solution, and it is unnecessary to resort to state law. Fed. R. Civ. Proc. 3 provides that "[a] civil action is commenced by filing a complaint with the court." Because federal law is not deficient on this subject, state law does not apply."

The Seventh Circuit's decision merely reaffirms Rule 3's clear applicability to the issue of how purely Federal claims are deemed "commenced" in Federal court. Petitioner's suggestion that *Wilson v. Garcia* or *Johnson v. Railway Express Agency, Inc.* renders the Seventh Circuit's decision suspect is groundless.[9]

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[9]Petitioners overstate the holding and significance of *Checki v. Webb,* 785 F.2d 534 (5th Cir. 1986). Besides dealing with distinguishable § 1983 claims, a reading of *Checki* shows it actually deals with the issue of whether a borrowed statute of limitation is tolled when the case is filed in a wrong venue. Needless to say, there is no express Federal law on this venue issue. The 7th Circuit's decision in this case specifically noted *Checki* but declined to follow that lone § 1983 case in light of the majority rule and the holdings of this Court. Three

CONCLUSION

The bright line rule for commencing Federal action in Federal Court is readily visible in FRCP 3: Federal actions are deemed commenced upon proper filing of the complaint. Uncertainty over the meaning of Rule 3 exists only in the minds of those litigants who would prefer to change the appearance of the Rule's plain language into a trap for the unwary in order to avoid litigating federal claims and rights on their merits.

Federal 10b-5 actions may only be brought in Federal court. All concerns regarding state/federal forum shopping are absent in this case. The only principal at stake is whether state procedural law or Federal procedural law should control over what is admittedly a purely Federal claim.

While in 10b-5 cases Federal law is silent on what *time period* of limitation should apply, there are readily-available and fully-authorized Federal rules of civil procedure dealing with the timing of service of Federal process and when a Federal claim will be deemed commenced. The Federal rules are not optional.

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[9] *continued*

days after *Checki*, the Eighth Circuit Court of Appeals also reaffirmed the majority rule that Rule 3 controls commencement issues in federal question claims. *Lyons v. Goodson*, 787 F.2d 411 (8th Cir. 1986). Additionally see the host of district court cases, all after *Checki*, continuing to recognize and apply Rule 3's commencement-upon-filing rule to Federal question cases (see footnote 3 infra).

Federal Rule 4(j) gives claimants asserting Federal rights 120 days in which to perfect service. The Federal drafters of FRCP 3 expressly rejected service within 60 days as a precondition to "commencing" Federal actions.

The Seventh Circuit's decision correctly reaffirms well established precedent that Rule 3 controls Federal question claims. A writ for certiorari of the lower court's decision is unwarranted.

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